

REMARKS

Claims 17, 38-41, 56-65 are pending in the application. Claims 39 and 40 are withdrawn from consideration. Claims 17, 38-41, 56-65 are rejected in this Office Action.

Rejection Under 35 U.S.C. §102(b)

Claims 17, 38, 56, 57, 60-65 are rejected under 35 U.S.C. §102(b) as being anticipated by Finkenaar et. al. (US Pat. 4,935,228) (the '228 patent or Finkenaar) as evidenced by Amoco Technical Data. Claims 17, 38, 58, 59-65 are are rejected under 35 U.S.C. §102(b) as being anticipated by Manufacturing Chemist as evidenced by Exxon Mobile Chemical Technical Data.

The Examiner states, "Finkenaar discloses a lip-gloss composition comprising mineral oil gel and polybutene." The Examiner states, "[t]he reference teaches polyiso- and normal butenes supplied by AMOCO from INDOPOL, H-100, H-300, and 1500...Polybutene Indopol H-100 has number average molecular weight 940."

The Examiner states, "Manufacturing Chemist teaches that poly-alpha-olefins (notably polydecene) are popular as oil-free emollients which are used as pigment wetting and dispersing aids...PureSyn 150 and 300 having a number average molecular weight of 3,500 and 5,100, respectively."

Applicant respectfully traverses the Examiner's rejection.

The allegedly invalidating reference must meet all the limitations of the claims. "[T]he court should determine "whether the subject of the barring activity met each of the limitations of the claim, and thus was an embodiment of the claimed invention." *Dana Corp. v. Am. Axle & Mfg., Inc.*, 279 F.3d 1372, 1375-76, 61 U.S.P.Q.2d 1609, 1611 (Fed. Cir. 2002), quoting *Scaltech Inc. v. Retec/Tetra, L.L.C.*, 178 F.3d 1378, 1383, 51 U.S.P.Q.2d 1055, 1058 (Fed. Cir. 1999). See also, *Toro Co. v. Deere & Co.*, 355 F.3d 1313, 1319 (Fed. Cir.), *reh'g denied*, 2004 U.S. App. LEXIS 4125 (2004) ("First, the district court never expressly construed limitation (c) of the '168 patent. The

analysis of anticipation should have begun by construing limitation (c), to guide the analysis of the allegedly anticipating prior-art reference.").

To anticipate a claim, a single source must contain all of the elements of the claim. See *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1379, 231 U.S.P.Q. 81, 90 (Fed. Cir. 1986); *Atlas Powder Co. v. E.I. du Pont De Nemours & Co.*, 750 F.2d 1569, 1574, 224 U.S.P.Q. 409, 411 (Fed. Cir. 1984); *In re Marshall*, 578 F.2d 301, 304, 198 U.S.P.Q. 344, 346 (C.C.P.A. 1978).

Applicants claim, A lip cosmetic comprising an anhydrous pigmented transfer resistant, film forming, cross-linked resinous silicone, composition for use in combination with a non-reactive wetting agent having affinity to, the composition, said wetting agent being a liquid polymeric hydrocarbon having a number average molecular weight greater than 650 devoid of non-volatile silicone oils, and wherein the wetting agent overcoat composition flows smoothly over the composition.

The '228 patent claims, A lip gloss comprising a mineral oil gel system comprising polyethylene having a molecular weight in the range of 1,000-25,000 and an ethylene-vinyl acetate copolymer having a molecular weight in the range of 2,000-3,000, wherein the weight proportion of the polyethylene to the ethylene-vinyl acetate copolymer is in the range of 90:10 to 70:30, respectively, where polyethylene is present in major proportion, and wherein the weight proportion of polyethylene to ethylene-vinyl acetate copolymer is in the range of 20:80 to 30:70, respectively, where the ethylene-vinyl acetate is present in major proportion, the lip gloss being a thermoplastic gel which maintains its consistency over the temperature range of 4.degree. C. to 45.degree. C., and having a viscosity in the range of 45,000 cps to 300,000 cps as determined on a Brookfield Helipath RVT Viscometer using a T-F spindle at 10 Rpm and at 25.degree. C.

The '228 patent requires, "an extremely stable lip gloss system is provided by a polyethylene-mineral oil gel system in combination with an ethylene-vinyl acetate copolymer." (Column 2, lines 20-23).

On page 29 of the subject application a color coat was applied to the lips and allowed to dry. A liquid polymeric hydrocarbon was applied over the color coat. The results of the experimentation indicates that only the claimed polymeric hydrocarbon gave the desired results.

This two part color coat liquid polymeric hydrocarbon system is not the gel system found in the '228 patent.

The '228 patent does not meet all the limitations of the claims; however, this is what must be done for a reference to anticipate.

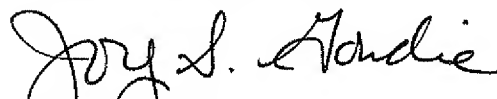
The Examiner points out, "Manufacturing Chemist teaches emollients that blend well with most cosmetic oils." (page 3 of office action).

Applicant's application does not claim a blending of the color coat with the liquid polymeric hydrocarbon. Instead, as exemplified on page 29 the color coat and liquid polymeric hydrocarbon and two individual systems applied as separate systems worn together.

Manufacturing Chemist does not meet all the limitations of the claims; however, this is what must be done for a reference to anticipate.

It is applicants position that the pending amended claims all contain limitations not found in any of the references, and that the Examiner consider that this application is ready for allowance.

Respectfully Submitted,



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